NO. 56475-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY MICHAEL KELLY,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Philip K. Sorenson

No. 05-1-00889-1

BRIEF OF RESPONDENT

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I. INTRODUCTION

Timothy Kelly sought relief from his judgment and sentence pursuant to *State v. Blake,*[1] many years after his convictions became final and he completed serving his term of incarceration. The superior court vacated Kelly's one conviction for unlawful possession of a controlled substance (UPCS) and struck the term of community custody associated with that crime. The court did not disturb or alter Kelly's sentences on the other five counts because Kelly had already served the entire term of incarceration and because the vacation of the UPCS did not alter the sentencing ranges.

Kelly appeals from the denial of his motion for resentencing. His appeal must be rejected on three grounds: mootness, untimeliness, and lack of prejudice. The vacation of count VI, the UPCS conviction, did not render the judgment facially invalid as to the remaining counts. The 116-month term of incarceration was fully authorized by the Sentencing Reform

[1] 197 Wn.2d 170, 481 P.3d 521 (2021).

Act. Further, a reduction in the period of incarceration will not impact the length of community custody that Kelly must serve.

II. COUNTERSTATEMENT OF THE ISSUES

A. Is a request for resentencing moot when brought after the defendant has already served the period of incarceration that was originally imposed?

B. Is a motion for resentencing based upon a technical error in the offender score time-barred by RCW 10.73.090 where the judgment and sentence correctly identifies the proper standard range for the corrected offender score and the court's sentence fell within this statutorily authorized range?

C. Is a defendant entitled to collateral relief when he cannot demonstrate actual prejudice from the alleged error?

III. STATEMENT OF THE CASE

Timothy Kelly was charged with one count of burglary in the first degree, two counts of assault in the second degree, one count of possession of stolen property in the first degree, one count of attempted theft in the first degree, and one count of unlawful possession of a controlled substance (UPCS) for an

incident that occurred on February 18, 2005. CP 1. Kelly was convicted of all six crimes by a jury. *See* CP 8; 2006 RP 3.[2]

Kelly's sentencing hearing was conducted on June 2, 2006. Based upon an extensive and agreed criminal history, 2006 RP 6-7, 16, his offender score for each crime was calculated as follows:

Count	**Offense**	**Offender Score**	**Standard Range**
I	Burglary in the First Degree	14	87-118 mos
II	Assault in the Second Degree	11	63-84 mos
III	Assault in the Second Degree	11	63-84 mos
IV	Possessing Stolen Property in the Second Degree	11	43-57 mos
V	Attempted Theft in the First Degree	11	32.25-42.75 mos
VI	UPCS	11	12+ - 24 mos

[2] The State's motion to transfer the transcript of Kelly's 2006 sentencing hearing from his first appeal, COA No. 35057-2-II, to this matter was granted on July 8, 2022. Because both the original sentencing hearing transcript and the *Blake* hearing transcript begin with page "1," the State will refer to the original sentencing hearing transcript as "2006 RP," and the *Blake* hearing transcript as "2021 RP."

2006 RP 6-7; CP 10.

The trial court imposed the top of the standard range for all offenses. CP 12. The court explained that it selected these terms of confinement because of the "significant impact" of the crime on the victims, "the events involved in this case,"[3] and Kelly's "horrible criminal record." 2006 RP 27. *See also* CP 45. The court also imposed community custody of 36 months on the burglary and assault counts, and 12 months on the UPCS count. CP 13. Absent an award of earned early release credits or credit for pre-trial detention, Kelly's 116 months of incarceration concluded no later than February 2, 2016.

Kelly unsuccessfully appealed his convictions. *See State v. Kelly*, COA No. 35057-2-II, 143 Wn. App. 1032 (March 11, 2008) (unpublished).[4] The mandate issued on April 24, 2008. CP 20.

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[3] A summary of the trial facts may be found at CP 22-27.

[4] A copy of this court opinion may be found at CP 22-53.

On April 5, 2012, Kelly filed a motion seeking relief pursuant to CrR 7.8(b). The superior court determined that this motion was "time-barred under RCW 10.73.090." CP 56.

On November 4, 2021, 13 years, 6 months, and 11 days after the mandate issued, the superior court held a hearing to address the impact *Blake* had upon this case. Kelly did not file a written motion prior to the hearing. At no point during the hearing did Kelly discuss any of the exceptions to RCW 10.73.090's one-year time bar on collateral attacks. *See* 2021 RP 9, 12-20.

The trial court vacated Kelly's UPCS conviction pursuant to *Blake*, eliminating the community custody imposed solely on this conviction. CP 58. The court declined to resentence Kelly because removing the UPCS from his offender score resulted in an unchanged standard range for burglary. CP 62. This is because Kelly's offender score was "14" with the inclusion of his UPCS, and "11" when the UPCS was vacated. CP 63; 2021 RP 10. In addition, Kelly's conviction of additional crimes after the June

2, 2006, sentencing hearing, more than offset the 3 points deducted due to *Blake*. CP 63 (Blake reduces current offender score by 3 points and subsequent convictions increase the offender score by 18 points); 2021 RP 10 (a new offender score calculated at the time of the *Blake* hearing for the burglary count would be a 23). The court also declined to resentence Kelly because he had already served his sentence. CP 62.

Kelly, who had already completed his term of incarceration in this case and had begun serving his sentence in another cause number (05-1-001173-6)[5] that was also before the court during the *Blake* hearing, had requested resentencing on the

[5] The trial court heard three cases in a single *Blake* hearing. *See* 2026 RP 3 ("This is the *State of Washington vs. Timothy Kelly*, Cause No. 05-1-001173-6, Cause No. 05-1-00889-1, and Cause No. 03-1-05256-8"). This appeal relates solely to Cause No. 05-1-00889-1.

Both the State and Kelly appealed from the *Blake* order entered in Cause No. 05-1-001173-6. Those appeals are being heard in Court of Appeals Cause No. 56461-1-II. That appeal has been "linked" with the appeal in this case, but not consolidated with this appeal.

grounds that RCW 9.94A.525(1) would create a presumption that the sentence in the other cause number would run concurrently with the sentence in this cause number. 2021 RP 14-15. Kelly cited no legal authority that renders RCW 9.94A.525(1) applicable to CrR 7.8(b) motions heard the same day regarding sentences originally imposed six months apart. *See* 2021RP 9-10, 12-20.

Kelly filed a timely notice of appeal in this matter. CP 64. This appeal has been linked with the State's appeal in 05-1-00889-1, which was heard by the superior court at the same time as this matter.

IV. ARGUMENT

A. A Trial Court Properly Denies a Request for Resentencing Where a Defendant Has Already Served the Imposed Term of Incarceration

Kelly served his entire 116-month sentence on count I prior to the *Blake* hearing. Because of this, the trial court could provide no effective relief under this cause number other than the

vacation of his conviction for UPCS. In other words, Kelly's request to be resentenced on the other counts was moot.

A resentencing based upon an error in an offender score is not required once an offender has completed his or her sentence. *State v. Ross*, 152 Wn.2d 220, 228-29, 95 P.3d 1225 (2004). A resentencing is also not required when the court cannot provide effective relief to the defendant. *Id.* Both circumstances are present in the instant case.

Kelly completed the 116-month term of incarceration no later than February of 2016—five years before the *Blake* hearing. While Kelly properly notes that he has not yet served the community custody portion of his sentence, Brief of Appellant at 16, the period of community custody cannot be reduced by any "excess" time served in total confinement. *State v. Jones*, 172 Wn.2d 236, 257 P.3d 616 (2011). Postrelease supervision, moreover, will not prevent a challenge to the term of incarceration from being dismissed as moot upon release from custody for that sentence. *See State v. Larranaga*, 126 Wn. App.

505, 507, 108 P.3d 833 (2005) ("While review of this case was pending, Larranaga was released from custody and placed on postrelease supervision. Consequently, this case is moot.").

Kelly does not identify any effective relief the trial court could provide him in *this* matter. At most Kelly states that "resentencing is critical because it may lead to a reduction of Mr. Kelly's total sentence and relief as to his legal financial obligations." Brief of Appellant at 13. But Kelly received a standard range sentence, and such a sentence is not subject to appeal. RCW 9.94A.585(1). Kelly, moreover, may obtain relief as to his legal financial obligations while incarcerated pursuant to a recently enacted statute. *See generally* Laws of 2022, chapter 260, § 9 (effective date January 1, 2023) (amends RCW 10.01.160(4) to allow incarcerated defendants to seek remission of the payment of costs). Kelly's request for resentencing was properly denied by the trial court.

The trial court did not err by denying Kelly's request for resentencing on counts I through V on grounds of mootness.

Kelly established no prejudice flowing from the inclusion of his UPCS conviction in his offender score. Kelly, moreover, has not identified any authority for resentencing him on counts I through V, 14 years after those sentences and convictions became final. Kelly's appeal must be rejected.

B. The Sole Remedy for a Sentencing Error in a Time-Barred Collateral Attack is Correction of Any Facial Invalidities

Kelly's judgment for the five remaining counts remains facially valid because his sentence on each count is statutorily authorized regardless of the vacated and dismissed UPCS conviction. Collateral attacks must be filed within one year of the date of finality unless the judgment is facially invalid, or a statutory exception applies. RCW 10.73.090; RCW 10.73.100. Because Kelly's judgment became final in 2008 when the mandate issued and it remains valid, his request for resentencing was time-barred. CP 20; RCW 10.73.090.

1. *Blake* Was Not a Material Change in the Law with Respect to Kelly's Non-UPCS Convictions

A collateral attack is subject to time limits. "No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one-year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction." RCW 10.73.090(1). *Accord* RCW 7.36.130(1); CrR 7.8(b). The one–year time limit for filing is not a blanket limitation. Broad exceptions are given for newly discovered evidence, convictions under unconstitutional statutes, convictions barred by double jeopardy, convictions obtained with insufficient evidence, sentences in excess of the court's jurisdiction, or significant changes in the law which will apply retroactively to the petitioner's case. RCW 10.73.100.

The defendant bears the burden of proving one of these exceptions. *Shumway v. Payne*, 136 Wn.2d 383, 399-400, 964 P.2d 349 (1998). To meet that burden of proof, the defendant

must state the applicable exception within the petition. *In re Pers. Restraint of Stoudmire*, 145 Wn.2d 258, 36 P.2d 1005 (2001). Kelly has not identified any applicable exception to the one-year time limit in either the superior court or this court.

Nonetheless, the State will concede that *Blake* falls within the scope of RCW 10.73.100(6)'s retroactivity exception with respect to UPCS. This exception provides that:

> (6) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

RCW 10.73.100(6). This exception provided the authority for the trial court to vacate Kelly's UPSC conviction (count VI), 14-years after Kelly's conviction became final.

The *Blake* decision, however, has limited "materiality" as to Kelly's other convictions. *Blake* declared the prior simple

UPCS law to be unconstitutional, it did not declare convictions for any other crime to be unconstitutional. The sole impact of *Blake* on other crimes is that UPCS convictions must be removed from the offender score calculations for those crimes. *See State v. Jennings*, 199 Wn.2d 53, 67, 502 P.3d 1255 (2022). This is because *State v. Ammons*, 105 Wn.2d 175, 187-88, 713 P.2d 719 (1986), *amended by* 105 Wn.2d 175, 718 P.2d 796 (1986), prohibits the inclusion of unconstitutional convictions in the determination of the offender score and the standard range sentence. But no rule from *Ammons* results in a per se facially invalid sentence that requires resentencing in all cases.

2. Facial Invalidity is Not a "Super Exception" to the One-Year Time Limit

Kelly's judgment is facially valid as to count I because the sentence imposed on the burglary count did not exceed the court's authority. Kelly's offender score for the burglary reduced from "14" to "11" with the removal of the UPCS conviction. The standard range, however, is the same for either offender score.

The only "facial invalidity" in the June 2, 2006, judgment, and sentence for count I is the offender score.

Facial invalidity only occurs when "the court actually exercised a power it did not have." *In re Pers. Restraint of Flippo*, 187 Wn.2d 106, 111, 385 P.3d 128 (2016). Facial invalidity exists if a trial court lacked the statutory authority to impose a sentence. *In re Pers. Restraint of Scott*, 173 Wn.2d 911, 916-17, 271 P.3d 218 (2012). "'Invalid on its face' does *not* mean that the trial judge committed some legal error." *Id.* at 916; *see also In re Pers. Restraint of Coats*, 173 Wn.2d 123, 144, 267 P.3d 324 (2011) ("only errors that result from a judge exceeding the judge's authority render a judgement and sentence facially invalid.").

Washington courts have found invalidity where the trial judge has imposed an unlawful sentence, or when the offender has been given a longer sentence than the statutory maximum authorized by law. *In re Pers. Restraint of Tobin*, 165 Wn.2d 172, 175–76, 196 P.3d 670, 672 (2008) (sentence exceeded statutory

maximum; remanded for resentencing within the standard range). Courts have also found facial invalidity on the judgment and sentences of offenders convicted of nonexistent crimes. *In re Pers. Restraint of Hinton*, 152 Wn.2d 853, 857, 100 P.3d 801 (2004). *Accord In re Pers. Restraint of Thompson*, 141 Wn.2d 712, 719, 10 P.3d 380 (2000) (judgment and sentence invalid when defendant pleaded guilty to "an offense which was not criminal at the time he committed it").

Facial invalidity will not be found in cases in which there is "a technical misstatement that had no actual effect on the rights of the petitioner." *In re Pers. Restraint of McKiearnan*, 165 Wn.2d 777, 783, 203 P.3d 375 (2009)). A miscalculated offender score is a technical misstatement that does not render a judgment facially invalid so long as the sentence imposed was authorized under the Sentencing Reform Act (SRA). *In re Pers. Restraint of Toledo-Sotelo*, 176 Wn.2d 759, 767, 770, 297 P.3d 51 (2013). Only when the miscalculated offender score alters the standard range, and the imposed sentence exceeds the corrected

standard range is the sentence not authorized by the SRA. *Id*.; *Coats*, 173 Wn.2d at 136.

Facial invalidity is not a "super exception" to the one-year time limit. *In re Pers. Restraint of Adams*, 178 Wn.2d 417, 309 P.3d 451 (2013). The existence of a facial invalidity only authorizes the court to address the facial invalidity. *Id.* at 425. The court is precluded from considering other time barred claims. *See In re Pers. Restraint of Snively*, 180 Wn.2d 28, 320 P.3d 1107 (2014) (community placement ordered for indecent liberties properly struck from judgment and sentence, but the facial invalidity did not allow the defendant to pursue his otherwise time barred claim to withdraw his guilty plea on the grounds he was misadvised of the community custody term); *In re Pers. Restraint of West*, 154 Wn.2d 204, 215, 110 P.3d 1122 (2005) (correcting an erroneous portion of a sentence does not affect the finality of those portions of the judgment and sentence what was correct and valid when imposed).

In this case, Kelly's 2006 judgment and sentence was facially invalid with respect to count VI, the UPCS count. The trial court granted Kelly full relief as to this count. CP 58. The facial invalidity as to count VI, however, did not alter the finality of the sentences on the other five counts.

The 116-month term of incarceration for count I, moreover, was authorized by the SRA for his seriousness level VII burglary with any offender score of "9+." *See* RCW 9.94A.510 (standard range for a seriousness level VII crime with an offender score of "9+" is 87 to 116 months). Removal of Kelly's UPCS conviction from his offender score for the burglary conviction has no effect on the trial court's sentencing authority because an offender score of "14" or "11" points yield the same standard range. *See State v. Alvarado*, 164 Wn.2d 556, 561, 192 P.3d 345 (2008) ("A defendant's standard range sentence reaches its maximum limit at an offender score of nine."). In imposing a sentence within that standard range, the sentencing court did not exercise a power it did not have. Under

these circumstances, the miscalculated offender score is a "technical misstatement" that does not render the judgment and sentence as to the burglary count facially invalid. *See Toledo-Sotelo*, 176 Wn.2d at 768-69.

Kelly's position that he is entitled to resentencing is largely based upon the direct appeal case of *State v. Jennings*, 199 Wn.2d 53, 502 P.3d 1255 (2022), in which the parties agreed that resentencing was required due to the removal of the defendant's prior UPCS from his offender score. Brief of Appellant at 12 (citing *Jennings*, 199 Wn.2d at 67). Apart from the fact that *Jennings* sentence was not yet final for purposes of RCW 10.73.090, a remand was required in that case because the removal of the UPCS points from his offender score for murder changed Jennings's standard range. *See State v. Jennings*, Washington Supreme Court Cause No. 99337-8, Supplemental Brief of Petitioner at 21 (July 7, 2021)[6] (offender score of eight

[6] This document may be found at https://www.courts.wa.gov/content/Briefs/A08/993378%20Petit

included two points for prior convictions for possession of a controlled substance); RCW 9.94A.510 (standard range sentence for a seriousness level XIV crime with an offender score of "8" is 257-357 months, and with an offender score of "6" is 195-295 months). The removal of Kelly's current and prior UPCS convictions from his offender score did not change his standard range for his burglary.

Kelly also cites to *State v. Markovich*, 19 Wn. App. 2d 157, 492 P.3d 141 (2021), *review denied*, 198 Wn.2d 1036, 501 P.3d 141 (2022). Brief of Appellant at 12. *Markovich* is distinguishable from Kelly's situation because the collateral attack based upon *Blake* was filed before Markovich's sentence became final, rather than 14-years later. *Id*. at 166 & n. 2. Thus, Markovich did not need to prove that his request for resentencing fell within the "facially invalid" or an RCW 10.73.100(6) exception. Kelly, however, must establish an exception to the

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one-year time bar on collateral attacks before any court can alter his sentence on non-UPCS counts.

Kelly has not offered any exception to the one-year time bar in RCW 10.73.090. Kelly has not established that the 116-month sentence he received for burglary was not authorized by law. The only relief Kelly might be entitled to with respect to count I is a CrR 7.8(a) order correcting the offender score.[7] The trial court did not, therefore, err in denying him resentencing on count I.

C. Kelly Cannot Demonstrate Prejudice from the Miscalculation of His Offender Scores

A defendant in a collateral attack must establish actual prejudice from the claimed error to obtain relief. Kelly fails to do so, merely positing that he might receive a lower sentence within the standard range for burglary if granted a resentencing. His speculation falls far short of that required for relief.

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[7] Kelly's presence is not required for the entry of this ministerial order. *See In re Pers. Restraint of Sorenson*, 200 Wn. App. 692, 701-03, 403 P.3d 109 (2017)

In any collateral attack, including one brought pursuant to CrR 7.8(b)(2), the defendant must establish actual prejudice to obtain relief. "Mere error is not enough to obtain collateral relief." *State v. Buckman*, 190 Wn.2d 51, 61, 409 P.3d 193 (2018). A petitioner must show actual and substantial prejudice to warrant relief for constitutional error. *In re Pers. Restraint of Meippen*, 193 Wn.2d 310, 316, 440 P.3d 978 (2019). Non-constitutional error, such as the statutory miscalculation of an offender score as in Kelly's case, requires a fundamental defect which inherently results in a complete miscarriage of justice. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 876 50 P.3d 618 (2002); *State v. Chambers*, 176 Wn.2d 573, 584, 293 P.3d 1185 (2013). Even where a judgment and sentence is invalid, a defendant must establish that the invalidity results in a complete miscarriage of justice. *In re Pers. Restraint of West*, 154 Wn.2d 204, 209, 110 P.3d 1122 (2005).

Kelly cannot show a fundamental defect resulting in a complete miscarriage of justice because the removal of his UPCS

from his offender score for his most serious crime, burglary, resulted in no change in the standard range. Although the removal of his UPCS from his offender scores for his two counts of assault in the second degree, one count of possession of stolen property in the first degree, and one count of attempted theft in the first degree may have changed his standard range for those offenses, Kelly cannot establish prejudice because those sentences were ordered to be served concurrently with his burglary sentence.

A fundamental defect occurs when a sentence is not authorized by the SRA. *Chambers*, 176 Wn.2d at 588. This can occur when a miscalculated offender score results in a sentence in excess of that permitted by statute. *Goodwin*, 146 Wn.2d at 867). It can also occur when the sentence imposed was inside the correct standard range for the recalculated offender score, but the trial court's explicit reasoning demonstrates it would have imposed a lower sentence had it known the true sentence range. *In re Pers. Restraint of Johnson*, 131 Wn.2d 558, 561-62, 933

P.2d 1019 (1997). These cases require that both the standard range, and the court's sentence, must be demonstrably affected by the error. Recalculation of an offender score from 14 to 11, leaving the standard range unaltered, does not result in a fundamental defect.

Kelly cannot even meet the lesser threshold of "actual and substantial" prejudice required for constitutional error. In the sentencing context, a petitioner demonstrates actual and substantial prejudice by showing the court's sentence would more likely than not have been different but for the error. *Meippen*, 193 Wn.2d at 316. Speculation based on "might" and "perhaps" is not enough to show the result would probably be different. *See In re Pers. Restraint of Fero*, 190 Wn.2d 1, 22, 409 P.3d 214 (2018).

Kelly cannot show that his sentence for the burglary would more likely than not be different but for his UPCS conviction. The court's unequivocal comments at sentencing show its top of the standard range sentence was based on Kelly's conduct, the

impact the crime had on his victims, and his prior criminal history – not on his possession of methamphetamine at the time of arrest. 2006 RP 27. *See also* CP 45. The supreme court in *Chambers* concluded from a trial court's similar comments about the defendant's conduct warranting a high-end sentence that the record showed the court would have imposed the same sentence regardless of the miscalculated offender score. *Chambers*, 176 Wn.2d at 589.

Even in a direct appeal an offender-score miscalculation is harmless where the standard range remains the same. *State v. Fleming*, 140 Wn. App. 132, 138, 170 P.3d 50 (2007). Only a reduced standard range as to the longest sentence, not a reduced offender score, requires resentencing on remand. *State v. Priest*, 147 Wn. App. 662, 673, 196 P.3d 763 (2008); *State v. Kilgore*, 141 Wn. App. 817, 824-25, 172 P.3d 373 (2007), *affirmed by State v. Kilgore*, 167 Wn.2d 28, 42, 216 P.3d 393 (2009).

Similarly, sentencing errors as to offenses that are served concurrently with a longer lawful sentence are considered

harmless on direct appeal. *See, e.g., State v. Longuskie*, 59 Wn. App. 838, 846-47, 801 P.2d 1004 (1990) (alleged error with respect to the imposition of an exceptional sentence for third degree child molestation was not prejudicial as defendant was sentenced to two concurrent terms, the longest of which was for kidnapping). Thus, Kelly cannot demonstrate sufficient prejudice from the miscalculated offender scores for counts II, III, IV, and V, to merit relief in this collateral attack because the sentences on those counts were served concurrently with the sentence imposed on count I, the burglary. Further, even if resentencing were granted as to these counts, Kelly's sentencing date for the burglary conviction would remain June 2, 2006, rather than the day the *Blake* order was entered. Because the burglary sentence was imposed on a different date than the sentence imposed in Kelly's other cause number,[8] the trial court

[8] Kelly's appeal in this case has been linked with the State's appeal from the *Blake* order issued in cause number 05-1-01173-6. The State and Kelly disagree on when sentencing occurred in that cause number. The State believes that sentencing occurred

was free to order the sentences imposed in both cause numbers to be served consecutively.

D. Kelly's Other Contentions Fail Because He Was Not Resentenced in this Case on November 4, 2021

Despite the trial court's denial of Kelly's request for resentencing, Kelly contends that the trial court was required to alter its previous legal financial obligations to match the law in effect today. Brief of Appellant at 17-20. Kelly is not entitled to the relief he seeks because Kelly's request for resentencing was time-barred. Kelly, moreover, cannot demonstrate prejudice because he will be able to seek remission of costs while still in prison pursuant to Laws of 2022, chapter 260, § 9 (effective date January 1, 2023).

Kelly also contends that the sentence in this cause number must now run concurrent with the sentence imposed six months

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in December of 2006, 2021 RP 9, with a resentencing in 2009, 2021 RP 11, and that no authority existed to resentence Kelly on November 4, 2021. Kelly believes that he was resentenced on November 4, 2021. *See generally State v. Timothy Kelly*, COA No. 56461-1-II.

later in cause number 05-1-01173-6 because the CrR 7.8(b) motions were heard the same day. Brief of Appellant at 13-17. Kelly is not entitled to the relief he seeks because his request for resentencing was time-barred, and he has provided no argument or citation to legal authority to support his thesis that RCW 9.94A.525(1) applies to CrR 7.8(b) motions heard the same day. *See* Brief of Appellant at 13-17.

Kelly's passing treatment of this issue and his lack of reasoned argument is insufficient to merit judicial consideration. *State v. Mason*, 170 Wn. App. 375, 384, 285 P.3d 154 (2012); RAP 10.3(a)(6). Kelly's failure to cite any legal authority in support of his thesis constitutes a concession that the claim lacks merit. *See State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978) (courts may assume that where no authority is cited, counsel has found none after diligent search); *State v. McNeair*, 88 Wn. App. 331, 340, 944 P.2d 1099 (1997) (failure to cite authority constitutes a concession that the argument lacks merit).

The trial court, therefore, did not err by denying Kelly's oral motion for resentencing.

V. CONCLUSION

Kelly's request for resentencing was properly denied as moot. His request also failed due to a lack of prejudice as his standard range for the most serious offense was unchanged by the removal of his UPCS conviction. Finally, Kelly's request for resentencing was time-barred as the sentence for count I, the burglary, is facially valid. Kelly's appeal must be denied.

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RESPECTFULLY SUBMITTED this 29th day of July, 2022.

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Date	Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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Superior Court Case Number:	05-1-00889-1

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